

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

HWA, INC.

Employer

and

DAVID JOHNSON, an Individual

Case 19-RD-3774

Petitioner

and

UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL
#234 (UGSOA)

Union

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION¹

I. SUMMARY

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (“the Act”), a hearing was held before a hearing officer of the National Labor Relations Board (“the Board”). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record² in this proceeding, I make the following findings and conclusions.³

United Government Security Officers of America, International Union, Local #234 (“the Union”) contends that the Petitioner, David Johnson (“Johnson”), possesses supervisory authority within the meaning of Section 2(11) of the Act. In particular, the

¹ The Region conducted an initial pre-election hearing in this case. Following that initial hearing, I issued a Decision and Direction of Election (“D&DE”) finding, among other things, no contract bar to further processing of the instant petition. Subsequent to that D&DE, the Union raised additional issues addressed in this Supplemental Decision.

² The parties did not submit briefs.

³ The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

Union contends Johnson possesses the authority to assign and/or direct employees. The Union further argues that the decertification petition must be dismissed in light of Johnson's supervisory status. However, HWA, Inc. (the Employer) and Johnson contend that Johnson is not a statutory supervisor. Based on the record evidence, I find, in agreement with the Employer and Johnson, the Union failed to meet its burden of establishing that Johnson possesses authority to assign and/or direct employees, or any other supervisory indicia.

Below, I have summarized the record evidence detailing Johnson's supervisory authority. My analysis of the record evidence, application of Board law, and conclusion follow the summary of evidence. Given my conclusion that there is no basis to dismiss the petition, the final section sets forth the direction of election.

II. RECORD EVIDENCE⁴

A. Background

Since about 1992, the Employer has operated as a government services contractor, providing security services to various federal agencies throughout Washington State. On about June 28, 2007,⁵ the Employer was awarded a contract with the Federal Aviation Administration (FAA) to provide security services for its air traffic control centers located in Auburn and Burien, Washington. The Employer has provided security for the FAA in the Auburn and Burien air traffic control centers through the FAA contract since about August 1.

Prior to August 1, Just-To-Clean, LLC, ("Just-To-Clean") had contracted to provide security services for the FAA at the Auburn and Burien centers. Security guards at those FAA facilities were represented for collective bargaining purposes by the Union.⁶ Sometime during the summer, the Union and Just-To-Clean executed a collective-bargaining agreement that would have been effective from June 2007 to June 2010.

When the Employer in late June 2007 succeeded Just-To-Clean as the security services contract provider, the Employer hired all, or nearly all, of Just-To-Clean's employees who had completed applications with the Employer. The Employer also agreed to recognize and bargain with the Union over security guards' terms and conditions of employment, but did not adopt or assume Just-To-Clean's collective-bargaining agreement, which did not contain a successor and assigns clause.

⁴ In reaching the decision in this supplemental D&DE, I take administrative notice of the record evidence from the initial hearing conducted in this case.

⁵ All dates are in 2007 unless otherwise noted.

⁶ The record shows that the Union was certified in August 2004 as the collective bargaining representative for security guards working at the FAA's Auburn and Burien locations. The employer/contractor at that time of certification was Diamond Detective Agency.

B. Management Structure

The Employer is a small government services contractor with a central office in Seattle, Washington. J. Thomas Wood is the Employer's President and Barbara Wood (his wife) is the Vice President. Under Mr. and Mrs. Wood are Otis Williams and Tysonia Green who are Contract Managers.

As set forth above, the FAA contract awarded to the Employer covers two air traffic control centers in Auburn and Burien. Approximately 21 security guards work in these two facilities. Generally, the guards work at the same location but some of the guards cover shifts at both locations. The Employer has one on-site stipulated supervisor, Pat Hale, who works at the Auburn facility. The parties stipulated that Hale receives approximately \$2.00 an hour more than the guards working for the Employer.

It is uncontested that Contract Managers Williams and Green are responsible for hiring, firing, transferring, and disciplining employees. Guard supervisor Pat Hale has apparently made recommendations regarding hiring, although there are no specifics in the record regarding these recommendations. It appears from the record that while working for Just-To-Clean, Hale played a role in hiring, firing, and disciplining employees. However, it is uncontested that Hale's role has changed under the Employer and he no longer has the same level of responsibility.

C. The Air Traffic Control Centers

1. Auburn

On weekdays, there are three daily shifts at the Auburn facility. These are: the day shift which runs from 6:00 a.m. to 2:00 p.m.; the swing shift which runs from 2:00 p.m. to 10:00 p.m.; and the graveyard shift which runs from 10:00 p.m. to 6:00 a.m. There are three guards on duty during the day shift on weekdays. Hale and Johnson are two of the three guards assigned to the day shift at Auburn. There are two guards on duty for the swing shift and two guards on duty for the graveyard shift. There are no supervisors on duty during the swing and graveyard shift at Auburn. On the weekend, there are two 12-hour daily shifts: the day shift from 6:00 a.m. to 6:00 p.m.; and the evening shift from 6:00 p.m. to 6:00 a.m. During the weekend shifts, there are two guards on duty for each shift. There are no supervisors on duty during the weekend shifts.

2. Burien

It appears from the record that the shift breakdown is the same at the Burien center as for Auburn, except that at Burien there are only two guards on duty for all of the shifts (i.e., day, swing, graveyard, and weekend) and there are no supervisors on duty during any of the shifts.

D. David Johnson

1. Guard Duties

Johnson has worked as a guard at the Auburn center for 6 years. Johnson was originally hired by Diamond Detective Agency. Johnson was hired by Just-To-Clean when it took over the contract sometime in 2005, and then by the Employer when they took over the FAA contract in August 2007.

Johnson is a security guard and his day-to-day duties are the same as all of the other guards in the unit. On a typical day, Johnson comes in at 6:00 a.m. and, if he is the first guard to come in for the shift, he will sign out the equipment that is needed for the shift and issue it to the other guards on duty. If he is not the first guard on the shift, the other guard on duty will perform this function. Then Johnson walks out to the gate, stands his post, and spends the day checking the identification of people coming into the facility. According to Johnson, the job is redundant and the only thing that varies day-to-day is the number of deliveries or the number of visitors at the facility. Johnson testified that the guards working in Auburn have been there for a while and, thus, everyone knows what they are supposed to be doing. As a guard, Johnson also periodically performs mail duty. Mail duty involves screening, scanning, and delivering mail to the facility. Johnson and the other day shift guards rotate performing this daily duty.

2. Substituting for Hale

Johnson has occasionally taken over some of Hale's responsibilities when Hale is on vacation. Johnson started substituting for Hale when he and Hale worked for Just-To-Clean. Hale generally takes about two vacations a year. Since the Employer took over the FAA contract, Hale has been on vacation only once. During that one vacation, Johnson again took over some of Hale's responsibilities.

When Hale is on vacation, Johnson will check the computer for FAA emails first thing in the morning. The emails come from the FAA and generally are sent to inform the guards of any deliveries or visitors scheduled to come into the facility. After checking the email, Johnson will put the information from the emails into the computer and he will inform the other guards of what packages are coming in and what visitors to expect. Although Johnson tends to perform this task when Hale is out, any of the guards can perform this task at the beginning of their shifts. Indeed, for each new shift one of the two guards on duty will check the FAA email.

While Hale is on vacation, Johnson does not take on several of Hale's regular duties. For example, Johnson does not attend FAA security meetings, change scheduling, grant time off, set up break times, or meet with Hale's appointments. It is uncontested that even when he is covering for Hale, Johnson is not involved in any way

in hiring, firing, disciplining, transferring, evaluating, promoting, laying-off or recalling employees.

The only significant responsibility Johnson performs when Hale is out is to ensure that there is shift coverage if someone calls in sick or does not show up for his scheduled shift. If a guard calls in because he is going to miss his shift while Hale is on vacation, the guard will call Johnson on Hale's pager. When a guard calls in sick, Johnson consults a list of guards that has been provided to him by Hale. Hale has instructed Johnson to start at the top of the list and call employees one-by-one to see if they can come in. It is Johnson's understanding that the list provided by Hale is a list of guards who will not accrue overtime if they come in to cover someone else's shift. Johnson has also been instructed to call guards who will incur overtime, only if he has exhausted the guards on the list provided by Hale. However, Johnson has never had to go beyond Hale's list when filling a shift. When Hale is out, Johnson will also fax the guards' time sheets over to the Employer, but he does not review them.

When a guard does not show up for their shift when Johnson is on duty, Johnson will ask the guards from the graveyard shift to stay over until the replacement comes in. However, there is no indication in the record that Johnson can require a guard to stay beyond their shift.⁷

3. Sending an Employee Home

There was a single incident when Johnson sent a guard home because the guard had mistakenly shown up for the wrong shift. Johnson was filling in for Hale at the time. This single incident occurred sometime in September 2006, when Johnson was still working for Just-To-Clean. The guard, Ted Wilson, who was sent home, was supposed to show up for his 6:00 a.m. shift. When Wilson did not show and failed to answer his phone, Johnson contacted Just-To-Clean District Manager Lloyd Waters and told Waters that Wilson had not shown up for his shift. Waters told Johnson that when Wilson showed up, Johnson should send Wilson home and tell him to give Waters a call. Wilson eventually showed up at Auburn at 2:00 p.m. He told Johnson that he had thought his shift started at 2:00 p.m. Johnson told Wilson to go home and call Waters because he had missed his shift.

III. ANALYSIS

A. Supervisory Authority

⁷ Larry Menzel, the Local Union president and a guard who works at the Burien facility, testified that a couple of months after the Employer took over the contract, Menzel received a call from Officer McCarthy, a guard working at the Auburn facility. According to Menzel, who was the only witness to testify about this incident, McCarthy told Menzel that he had called Johnson when a guard failed to show up at the Auburn facility and Johnson had told McCarthy to find someone to replace the missing guard. Such hearsay testimony cannot support a claim that Johnson used independent judgment to inform McCarthy that he should find a replacement for the shift.

Section 2(11) of the Act defines “supervisor” as:

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Pursuant to this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., “assign” or “responsibly to direct”) listed in Section 2(11); (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment”; and (3) their authority is held “in the interest of the employer.” NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. Moreover, “the burden of proving supervisory status rests on the party asserting that such status exists.” Dean & Deluca New York, Inc., 338 NLRB 1046, 1047 (2003); accord Kentucky River, 532 U.S. at 711-712 (deferring to existing Board precedent allocating burden of proof to party asserting that supervisory status exists). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. Dean & Deluca, 338 NLRB at 1047; Bethany Medical Center, 328 NLRB 1094, 1103 (1999). Croft Metals, Inc., 348 NLRB No. 38 (2006).

The Union appears to contend that David Johnson is a statutory supervisor because he possesses Section 2(11) authority to assign and responsibly direct employees under the standard set forth in Oakwood Healthcare, 348 NLRB No. 37 (2006). As set forth below, I find that there is nothing in the record to indicate that Johnson has any supervisory indicia.

B. Assignment

In Oakwood Healthcare, supra, the Board interpreted the Section 2(11) term “assign” to mean the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” Id. at slip op. 4. To “assign” for purposes of Section 2(11) “refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task.” Id. at slip op. 4.

Here, the evidence fails to establish that Johnson uses independent judgment when assigning employees. Specifically, Johnson’s role in assigning employees is to call employees off of a predetermined list, when an employee either calls in or fails to show up for his post. Johnson’s uncontradicted testimony was that when Hale is out of the office, he provides Johnson with a list of employees to call if someone fails to show

up for their post. Johnson has no leeway regarding whom he calls first, as Johnson must, per Hale's instructions, start at the top of the list and work down from there. However, the Board has found that such circumscribed authority, does not constitute independent judgment. See Oakwood Healthcare, slip op. at 8 (finding judgment not independent if it is dictated or controlled by detailed verbal instructions from a higher authority); See also, Dynamic Science, Inc., 334 NLRB 391, 391 (2001).

C. Responsibly Direct

The record evidence also fails to establish that Johnson responsibly directs his fellow guards. The Board has held that the authority "responsibly to direct" arises if rank and file employees report to "a person on the shop floor" and "that person decides 'what job shall be undertaken next or who shall do it,' . . . provided that the direction is both 'responsible' . . . and carried out with independent judgment." Oakwood Healthcare, slip op. at 6. The Board further held that the element of direction that is "responsible" involves a finding of accountability, such that the "employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary" and that "there is a prospect of adverse consequences for the putative supervisor" arising from his/her direction of other employees. Id. slip op. at 7.

The only arguable evidence of direction set forth in the record is when Johnson instructed Wilson to go home because he had missed his shift. This incident fails to establish Johnson's use of independent judgment in directing employees while employed by the Employer on three counts. First, this event took place while Hale and Johnson were working for Just-To-Clean, not the Employer herein. Second, in telling Wilson to go home when he showed up for the wrong shift, Johnson was merely relaying a directive given to him by Just-To-Clean manager Llyod Waters. As set forth in Oakwood Healthcare, slip op. at 8, judgment is not independent if it is dictated by detailed verbal instructions by a higher authority. Third, there is no evidence that Johnson was held responsible in any way for sending Wilson home that day.⁸

D. Part Time Supervisor

Initially I note that, with the exception of the random circumstance when Johnson substituted for Hale, Johnson's normal duties are identical to all the other unit guards. Moreover, even assuming, arguendo, Johnson possessed statutory supervisory authority on those occasions when he substituted for Hale, the Union has also failed to establish that Johnson substituted for Hale on a regular and substantial basis. The Board has held that "where an individual is engaged a part of the time as a supervisor and the rest of the time as a unit employee, the legal standard for a supervisory

⁸ As noted above, Menzel testified about an isolated incident during which Johnson purportedly directed employee McCarthy to find a replacement for a shift. However, Menzel's testimony in this regard was based on hearsay and failed to provide critical details underlying the purported direction. Accordingly, I find that Menzel's testimony in this regard fails to establish that Johnson possesses authority to assign and/or to responsibly direct employees.

determination is whether the individual spends a regular and substantial portion of his or her work time performing supervisory functions.” Oakwood Healthcare, slip op. at 9 (2006); Brown & Root, Inc., 314 NLRB 19, 21 (1994). Under the Board’s standard, “regular” means according to a pattern or schedule, as opposed to sporadic substitution. Oakwood Healthcare, slip op. at 9. Although the Board has not adopted a strict numerical definition of substantiality, it has found supervisory status where the individuals have served in a supervisory role at least 10-15 percent of their total work time. Id, slip op. at 9. As with other aspects of establishing supervisory status, the burden is on the party who asserts supervisory status to prove regularity and substantiality. Oakwood Healthcare, slip op at 14.

Here, the Union has failed to establish either regularity or substantiality of Johnson’s time filling in for Hale. With regard to regularity, Johnson fills in for Hale when Hale takes time off or is absent for some other reason. The record evidence establishes that Hale may take a holiday off and usually goes on vacation twice a year. As set forth above, under the Board’s standard, “regular” means according to a pattern or schedule, as opposed to sporadic substitution. Johnson filling in while Hale is on vacation is by definition sporadic substitution and therefore not regular as that term is defined by the Board. Moreover, the uncontradicted record evidence is that since the Employer has taken over the FAA contract (approximately a 6-month period), Hale has reportedly only gone on vacation one time. While the record was not clear on the length of the vacation, Johnson’s substitution for Hale would not be equivalent to 10 percent of Johnson’s working time even if I were to assume Hale’s vacation was a full 2 weeks.

In light of the above and the record as a whole, I find that the Union has failed to carry its burden of establishing that Johnson possesses indicia of supervisory authority as that term is defined in Section 2(11) of the Act.

IV. CONCLUSION

As David Johnson is not a statutory supervisor, there is no basis to dismiss the petition. At the initial hearing, the parties stipulated to a description of the unit appropriate for purposes of an election in this matter. That description is in substantial accord with the unit description in the Union’s collective-bargaining agreement with Just-To-Clean. In line with the parties’ stipulation and the Just-To-Clean collective-bargaining agreement, I shall direct an election in the following appropriate unit (“Unit”):

All Security Officers (Guards) employed at Seattle Air Route Traffic Control Center (ARTCC) at 3101 Auburn Way S., Auburn, Washington; and Seattle Air Traffic Control Tower (ATCT), SSC, 825 S. 160th Street, Burien, Washington; excluding all other employees, clerical employees, and supervisors as defined in the Act.

There are approximately 21 employees in the Unit found appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Government Security Guards of America, Local 234, affiliated with United Security Guards International Union.

A. List of Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before **February 13, 2008**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. Notice Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **February 20, 2008**. The request may be filed through E-Gov on the Board's web site, www.nlr.gov, but may not be filed by facsimile.⁹

DATED at Seattle, Washington, this 6th day of February, 2008.

/s/ [Richard L. Ahearn]
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

⁹ To file a request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.